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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91123506
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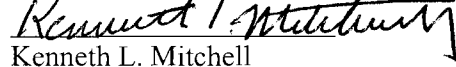
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before The Trademark Trial and Appeal Board

Pucel Enterprises, Inc.)
1440 E. 36th Street)
Cleveland, OH 44114)
)
Opposer-Petitioner) CONSOLIDATED
)
v.) Opposition No. 91123506
) Cancellation Nos. 92031984;
) 92032024; 92032025
Grizzly Industrial, Inc.)
1821 Valencia Street)
Bellingham, WA 98226)
)
Applicant-Respondent)
)

OPPOSER-PETITIONER PUCEL'S REPLY BRIEF

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Respectfully Submitted,


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OPPOSER-PETITIONER PUCEL'S REPLY BRIEF

I. REPLY TO DISPOSITIVE ISSUES:

1. G.I.'s registrations: SEE OPPOSER-PETITIONER'S TRIAL BRIEF

2. Pucel's Registration's: SEE OPPOSER-PETITIONER'S TRIAL BRIEF

3. Dilution: DILUTION CLAIM WAS PREVIOUSLY WITHDRAWN

4. Pucel's registrations: SEE OPPOSER-PETITIONER'S TRIAL BRIEF

5. Acquiescence/Estoppel:

i) NO ACQUIESCENCE/ESTOPPEL

1. ACQUIESCENCE/ESTOPPEL NOT PLEADED

R. 8c, Fed. R. Civ. P, provides:

“In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, **estoppel**, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.” R. 8c, Fed. R. Civ. P.

Likewise, 37 CFR § 2.114(b)(1) provides in pertinent part that: An answer may contain any defense, including the affirmative defenses of unclean hands, laches, **estoppel**, **acquiescence**, fraud, mistake, prior judgment, or any other matter constituting an avoidance or affirmative defense. When pleading special matters, the Federal Rules of Civil Procedure shall be followed.

Here, APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has failed to plead affirmative defenses including but not limited to acquiescence and estoppel and thus the TTAB should not consider such defenses as APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has waived them by not timely pleading them.

2. ACQUIESCENCE/ESTOPPEL NOT AVAILABLE

In *Reflange Inc. v. R-Con International*, 17 USPQ 2d 1126, 1131 (TTAB 1990), the U.S. Patent

and Trademark Office Trademark Trial and Appeal Board held that it is not necessary to discuss the theory of acquiescence because it is well established that equitable defenses such as laches and estoppel will not be considered and applied where the marks of the parties are identical and the goods are the same or essentially the same. The TTAB held that even a well-taken defense of acquiescence would not preclude a judgment for plaintiff if it is determined that confusion is inevitable, and confusion between identical marks used for identical goods is inevitable.

OPPOSER-PETITIONER PUCEL and APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL both use the identical mark GRIZZLY on identical goods as set forth in OPPOSER-PETITIONER PUCEL'S opening brief and confusion is inevitable.

3. R. 408, Fed. R. Evid., DECLARES SETTLEMENT ATTEMPTS INADMISSIBLE

R. 408, Fed. R. Evid., entitled *Compromise and Offers to Compromise*, provides:

Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim.

Here, the letter (A/R GRIZZLY INDUSTRIAL TR. EXH. 64) upon which APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL relies on to establish acquiescence is an attempt by OPPOSER-PETITIONER PUCEL's attorney to offer or promise to furnish a valuable consideration in compromising or attempting to compromise claims. OPPOSER-PETITIONER PUCEL's attorney was attempting to investigate and resolve issues concerning APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's use of the GRIZZLY mark and thus Fed. R. Evid., R. 408, prohibits its admissibility into evidence. It should be noted that the letter was written approximately one year *before* the filing of the Opposition and Cancellations whereas APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's

brief *incorrectly* indicates that the letter was written *after* the filing of the Opposition and Cancellations.

The letter was a settlement offer in regard to a matter of trademark infringement which could have been brought in a United States District Court. Nor is the fact that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL offered to purchase OPPOSER-PETITIONER PUCEL to settle the dispute admissible to show APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's guilt in regard to trademark infringement. See, A/R GRIZZLY INDUSTRIAL D. DEPO EXH. O/P 24 wherein APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL referred to settlement by purchasing OPPOSER-PETITIONER PUCEL.

6. Pending Motions/Amendments:

- i) **THE PROPOSED AMENDMENT TO THE '346 APPLICATION (O/P PUCEL TR. EXH. 7) TO REGISTER GRIZZLY.COM AND THE '625 REGISTRATION (O/P PUCEL TR. EXH. 9) WILL NOT PREVENT DAMAGE TO OPPOSER-PETITIONER PUCEL BECAUSE THE GOODS AND SERVICES OF PUCEL AND APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL ARE THE SAME AND ARE INTEGRALLY RELATED**

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has filed motions to amend the '625 registration and the '346 application (A/R GRIZZLY INDUSTRIAL TR. EXH. 62).

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL argues and contends that the identification in the '346 application narrows the description of the services and limits the channels of trade to products for woodworking and metal working. APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL further argues and contends that the amendment to the '346 application deletes services featuring dollies, hand trucks, storage bins, tool tables, sliding tables, and material handling equipment, namely, carts, casters, and wheels, mobile bases, outfeed tables and stands, roller stands, rollers, tables and work stands.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL similarly argues and contends that the identification in the '625 registration narrows the description of the services and limits the channels of

trade to products for woodworking and metalworking. However, the amendments do not prevent damage to the OPPOSER-PETITIONER PUCEL because the online retail store services for related industrial goods will cause diversion of sales from OPPOSER-PETITIONER PUCEL to APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL.

ii) APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL HAS NOT DELETED ALL REFERENCES TO THE GOODS IDENTIFIED IN OPPOSER-PETITIONER PUCEL'S REGISTRATIONS

First, it is apparent that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has not deleted all references to the goods identified in OPPOSER-PETITIONER PUCEL'S registrations (O/P PUCEL TR. EXH. 1-6) found in the '346 application to register GRIZZLY.COM. See, the annotated '346 application to register GRIZZLY.COM on pages 20-22 of OPPOSER-PETITIONER PUCEL'S opening brief wherein additional recitations of goods recited in OPPOSER-PETITIONER PUCEL'S registrations are identified and not stricken in the '346 application to register GRIZZLY.COM. Further, OPPOSER-PETITIONER PUCEL's United States Trademark Registration No. 0,624,055 (O/P PUCEL TR. EXH. 1) includes tables, benches, cabinets, racks, shelves, stands, desks **and parts thereof**. See, O/P PUCEL RM TR. DEPO. pp. 119, wherein Mr. Robert Mlakar identified several parts of the above listed goods. For example, "drawer pulls" and "drawer slides" are identified as part of cabinets. These goods have not been stricken in the amendment to the '346 application to register GRIZZLY.COM.

iii) APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL HAS NOT DELETED ALL OF THE GOODS UPON WHICH OPPOSER-PETITIONER PUCEL USES ITS MARKS GRIZZLY AND GRIZZLY BEAR SYMBOL

Second, it is apparent that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has not deleted all of the goods upon which OPPOSER-PETITIONER PUCEL uses its marks GRIZZLY and the GRIZZLY BEAR SYMBOL. Testimony was given by Mr. Robert Mlakar about the common law usage of the marks on the goods which are related to the goods identified in the registrations as accessories. Dates of first use were also identified by Robert Mlakar through his trial testimony. See, O/P PUCEL

RM TR. DEPO pp. 28-29 and 39-96. These goods and services are not underlined on pages 20-22 of OPPOSER-PETITIONER PUCEL'S opening brief but they are bolded to indicate parts of goods covered by, for example, the 624,055 registration and common law usage of GRIZZLY for online services.

iv) THE GOODS AND PARTS THEREOF RECITED IN OPPOSER-PETITIONER PUCEL'S REGISTRATIONS ARE THE IDENTICAL GOODS IDENTIFIED IN THE '346 APPLICATION TO REGISTER AND THE '625 REGISTRATION; OPPOSER-PETITIONER PUCEL'S WEBSITE PROVIDES IDENTICAL SERVICES OF ONLINE RETAIL SALES; THE MARKS OF THE PARTIES ARE IDENTICAL

The goods recited in OPPOSER PETITIONER PUCEL's registrations are the **identical** goods recited in APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's application to register such that confusion as to source or sponsorship among customers and potential customers when confronted with these identical marks is likely. Mr. Robert Mlakar testified at trial that OPPOSER-PETITIONER PUCEL engages in online retail store services. (O/P PUCEL RM TR. DEPO p. 128). Mr. Mlakar stated that all products identified in its catalogs are also sold online or that the customer may optionally contact OPPOSER-PETITIONER PUCEL directly through e-mail. Mr. Mlakar also indicated that all products may be purchased by using the Thomas Register website (O/P PUCEL TR. EXH. 38A) or, for instance, by the Indoff website (a distributor of OPPOSER-PETITIONER PUCEL, O/P PUCEL TR. EXH. 60; O/P PUCEL RM TR. DEPO. pp 128-135). The Thomas Register hosts the OPPOSER-PETITIONER PUCEL website and it has been online since 1994-1996. Mr. Robert Mlakar has worked diligently to create the website and develop the search terms which are designed to bring customers to OPPOSER-PETITIONER PUCEL'S website. See O/P PUCEL'S TR. EXH. 38A, first page thereof, listing a diverse list of equipment sold under the GRIZZLY and GRIZZLY BEAR SYMBOL by OPPOSER-PETITIONER PUCEL. See OPPOSER-PETITIONER PUCEL'S opening brief pg. 27 and the testimony of Mr. Robert Mlakar at O/P PUCEL RM TR. DEPO pp. 128-140 describing OPPOSER-PETITIONER PUCEL'S website activity and links.

v) WOODWORKER/WOODWORKING AND

METALWORKER/METALWORKING DEFINED

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL does not identify its stores as Grizzly Industrial stores as alleged in its brief, rather, it uses GRIZZLY.COM on its store fronts. See, A/R GRIZZLY INDUSTRIAL SB TR. DEPO p. 90.

Mr. Shiraz Balolia at his discovery deposition defined woodworkers as cabinet shops and homeowners. Mr. Balolia further defined metalworkers as small home shops, small machine shops and repair shops. “Repair shops” mean a maintenance shop for anything according to Mr. Balolia. (A/R GRIZZLY INDUSTRIAL SB DISC. DEPO. p. 37). When asked if there were any other ways to describe the metalworking industry, Mr. Balolia, President of the party in position of defendant, replied: “No.”

Mr. Balolia indicates on page 3 of the 2001 Grizzly Industrial Catalog (O/P PUCEL TR. EXH. 69) a listing of his better known customers. The catalog states:

“A SAMPLING OF OUR CUSTOMERS, Our customers range from small home shop tool lovers to thousands of schools, hospitals and large industrial users. Listed below are some of the more known entities that purchase from Grizzly..(list follows)..Whether you spend \$20 or \$20,000 with us you can be assured that the attention to your order and level of service you will receive will be exemplary.” (A/R GRIZZLY INDUSTRIAL D. DEPO. EXH. O/P 4; O/P PUCEL TR. EXH. 69) (emphasis ours)

Mr. Balolia's definition of woodworkers and metalworkers as being “small shops” is definitely in direct contradiction to APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL’S 2001 Catalog statement indicating that their customers include **thousands of schools, hospitals and large industrial users.**

The customers identified as APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL’S “more-known” customers are also OPPOSER-PETITIONER PUCEL’S customers as set forth in PUCEL’S opening brief p. 49 and APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL sells approximately **\$5,000,000** to PUCEL’S customers. See, APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL’S

brief p. 22.

When asked which of the more-known customers were APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S woodworking customers, Mr. Balolia, testifying on behalf of the corporation did not know. When asked which of the more-known customers were APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S metalworking customers, Mr. Balolia, testifying on behalf of the corporation did not know. (A/R GRIZZLY INDUSTRIAL SB DISC. DEPO. p. 39)

Mr. Balolia claims that his hand trucks may be used to move refrigerators but only refrigerators for woodworking or metal working shops.¹ This is exemplary of APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S attempts to manufacture differences in its line of goods identified in the application to register GRIZZLY.COM from the line of goods in the registrations of OPPOSER-PETITIONER GRIZZLY INDUSTRIAL. (A/R GRIZZLY INDUSTRIAL SB DISC. DEPO. pp. 60-61). Mr. Balolia reluctantly admitted that OPPOSER-PETITIONER PUCEL'S platform trucks are the same as the platform trucks of APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S platform trucks and can be used for some applications of metalworkers and woodworkers. (A/R GRIZZLY INDUSTRIAL SB DISC. DEPO. pp. 66-67)

vi) OPPOSER-PETITIONER PUCELS REGISTRATIONS ARE NOT LIMITED AS TO SCOPE

OPPOSER-PETITIONER PUCEL'S registrations are not limited as to their scope and accordingly cover woodworkers and metalworkers as well as all other types of customers and as well as all other distribution channels. *Squirtco v. Tomy Corp.*, 216 USPQ 939 (Fed. Cir. 1983); *MSI Data Corporation v. Microprocessor Systems, Inc.*, 220 USPQ 655, 658, (TTAB 1983). APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL is impermissibly trying to reduce the scope of the

¹ Mr. Balolia, however, did admit that refrigerators are not woodworking or metalworking equipment.

registrations. Where likelihood of confusion is asserted with a registered mark, the issue must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution. *San Fernando Electric Manufacturing Co. v. JFD Electronics Components Corp.*, 565 F.2d at 685, 196 USPQ 1, 2 (CCPA 1977) (doubts are resolved against newcomers in a §2(d) analysis; technical sophistication of purchasers and purchaser care not a factor where the goods are the same and the marks are similar).

vii) SERVICES AND GOODS OF APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL ARE RELATED TO THE SERVICES AND GOODS OF OPPOSER-PETITIONER PUCEL

The opposition to the entire application to register GRIZZLY.COM should be sustained because the goods and services of the parties are identical and the marks of the parties are identical or nearly identical.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL argues that the amendments to the '346 application to register GRIZZLY.COM are cited in its brief to imply good corporate citizenship and such an amendment eliminates all confusion dismissing OPPOSER-PETITIONER PUCEL'S claim as to relatedness of goods and services as unwarranted beyond the obvious and numerous instances of direct overlap of the goods and services. See, for instance, the annotated identification of directly overlapping goods and services for the application to register GRIZZLY.COM on pages 20-22 of OPPOSER-PETITIONER PUCEL's opening brief.

However, APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL says one thing to the TTAB and the callously does another. See, for example APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S website advertising a tool cabinet with the cabinet marked GRIZZLY. The website page is: <http://www.grizzly.com/products/H7742/images>.

Mr. Balolia testified that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL does not mark its products with the GRIZZLY trademark which he sells in his building with the banner GRIZZLY.COM plastered on it. See, A/R GRIZZLY INDUSTRIAL SB TR. DEPO. p. 84-85 wherein Mr. Balolia testified, under oath, that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL does not mark its products with the mark GRIZZLY.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL is attempting to hide behind its amendments to prevent adverse decisions to its '346 application to register GRIZZLY.COM and its '625 registration in their entireties. Relatedness of goods and services was previously addressed and decided by the Trademark Trial and Appeal Board in *MSI Data Corporation v. Microprocessor Systems, Inc.*, 220 USPQ 655, 657 (TTAB 1983).

In *MSI Data Corporation v. Microprocessor Systems, Inc.*, 220 USPQ 655, 658, (TTAB 1983), The Trademark Trial And Appeal Board stated:

“In making this determination, it is clear that we must proceed on the basis of the parties’ goods and services as they are identified in the pertinent registrations and application for registration [*Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 177 USPQ 76 (CCPA 1973), *Ford Motor Co. v. Ford*, 174 USPQ 456 (CCPA 1972)] and that applicant’s description of services is to be construed favorably to opposer, particularly in view of the requirement in Section 1(a)(1) of the Trademark Act that descriptions of goods must be specific. *CTS Corp. v. Cron-stoms Manufacturing, Inc.*, 185 USPQ 773 (CCPA 1975); *David Crystal, Inc. v. Soo Valley Co.*, 176 USPQ 326, 327 (CCPA 1973). Moreover, it is well established that a “relatedness” which bespeaks likelihood of confusion may occur not only where goods are involved but can exist between products on the one hand and services dealing with or related to those products on the other hand. *Safety-Kleen Corp. v. Dresser Industries, Inc.*, 186 USPQ 476, 480 (CCPA 1975); *In re H.J. Seiler Co.*, 129 USPQ 347 (CCPA 1961); *In re Solar Energy Corp.*, 217 USPQ 744 (TTAB 1983); *Corinthian Broadcasting Corp. v. Nippon Electric Co., Ltd., Opp. No. 63,918*, 219 USPQ 733 (TTAB 983). **Further, the requisite relatedness may exist even though the products and/or services are not competitive and have significant differences if they could nevertheless come to the attention of the same types of customers under circumstances suggesting a common origin.** *Cooper Industries, Inc. v. Repcoparts USA, Inc.*, 218 USPQ 81 (TTAB 1983); *Monsanto v. Enviro-Chem Corp.*, 199 USPQ 590, 595-6 (TTAB 1978); *Sun Electric Corp. v. Sun Oil Company of Pennsylvania*, 196 USPQ 450 (TTAB 1977).” (Emphasis ours)

As previously discussed in OPPOSER-PETITIONER PUCEL’s opening brief, pp 20-27,

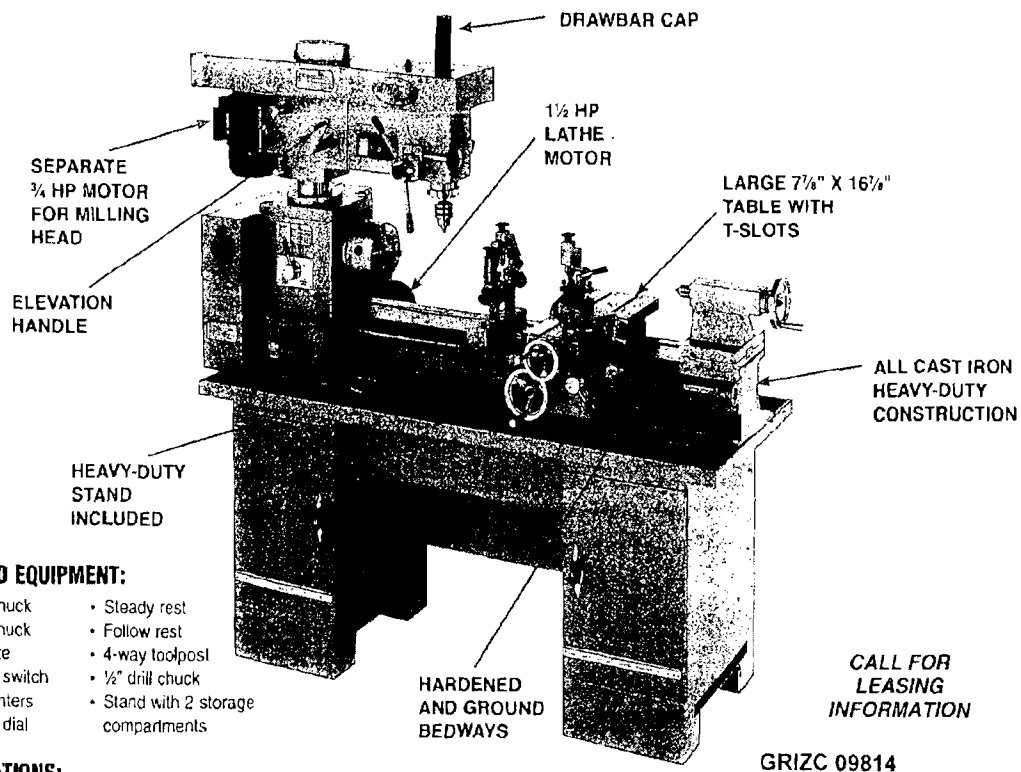
OPPOSER-PETITIONER PUCEL's goods and services are **identical to** APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's goods and services as set forth in its registrations and application.²

The identity of goods and services identified herein and in OPPOSER-PETITIONER PUCEL'S opening brief demonstrates "relatedness" in the establishment of likelihood of confusion. Further, the "relatedness" between OPPOSER-PETITIONER PUCEL'S goods and services on the one hand and APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S services dealing with or "related" to those goods on the other hand, namely the operation of an online retail store under the identical mark for the same goods bespeaks likelihood of confusion.

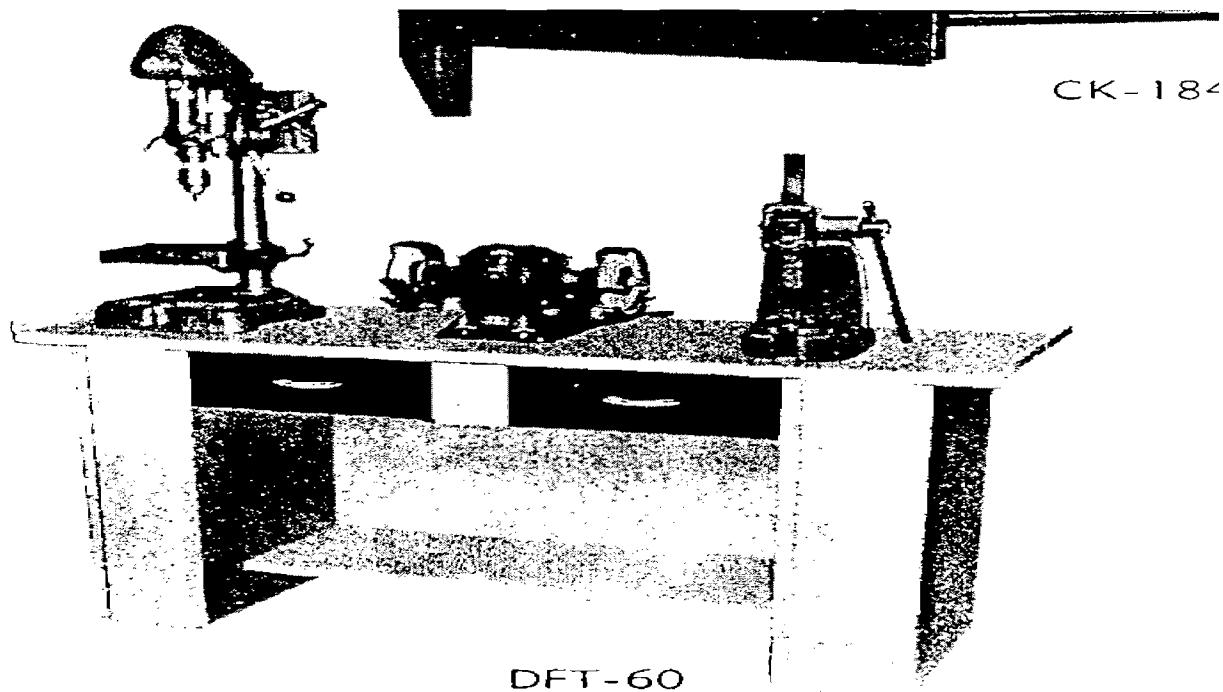
APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL argues that some of the goods identified in its '346 application to register and its registrations are not related. However, the requisite relatedness exists here despite APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S argument that some of its goods and/or services identified in its application/registrations are not competitive and have significant differences because they nevertheless come to the attention of the same types of customers under circumstances suggesting a common origin. As illustrated in OPPOSER-PETITIONER PUCEL'S opening brief at pp. 32-34 some of the parties' customers are identical. Other customers are actually confused as set forth in O/P PUCEL TR. EXHS. 44-50.

APPLICANT-RESPONDENT'S GRIZZLY INDUSTRIAL's 2005 Product Catalog (O/P PUCEL TR. EXH 68, p. 463, GRIZC 09814, also A/R GRIZZLY INDUSTRIAL TR.

² In regard to the '346 application to register, both OPPOSER-PETITIONER PUCEL and APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL are using **identical marks** for at least the following goods and online services as set forth on pages 20-22 of OPPOSER-PETITIONER PUCEL's opening brief, namely: anti-vibration mounts, cable ties, clamps and vises, dollies, drafting boards, electric motors, engine stands, gauges, hand screws, hand trucks, hose reels, hoses, jacks, knobs, lathe accessories, machine mounts, magnetic switches, pulleys, router table, slide tables, spindles, storage bins, switches, tool tables, wagons, tool boxes, tool organizers, bumpers, drawer pulls, drawer slides, hinges, lock sets, shelf supports, electric switches, motors, rotary tables, sliding tables, spindles, stands, tool holders, material handling equipment, cars, casters and wheels, mobile bases, outfeed tables and stands, roller stands, rollers, tables, work stands and measuring tools.



O/P PUCEL TR. EXH. 68, p.463, GRIZC 09814



O/P PUCEL TR. EX. 15, p. 14, 15, ONE OF PUCEL'S STAND IN ITS CATALOGS

EXH. 1, p. 378) reproduced above (top drawing page 16) is an example advertising a lathe and a stand together. Close inspection of the advertisement reveals a “HEAVY-DUTY STAND INCLUDED” with the lathe.

Similarly, OPPOSER-PETITIONER PUCEL advertises its machine stands (lower drawing page 16) supporting various equipment such as lathes, drill presses etc. See, O/P PUCEL TR. EXH. 23, pg. 51, (PUCEL 1970 CATALOG); O/P PUCEL TR. EXH. 19, pg. 41 (PUCEL 1961CATALOG); O/P PUCEL TR. EXH. 28, pg. 24 (PUCEL 1981 CATALOG); and O/P PUCEL TR. EXH. 30, pg. 19 (PUCEL CATALOG 1990).

Comparing the two illustrations above, STANDS and the equipment with which they are used are integrally related. In other words lathes, drill presses, mills, etc. cannot be practically used absent a stand. Put another way, a stand is naturally used with lathes and all sorts of similar industrial equipment. Robert Mlakar testified that OPPOSER-PETITIONER PUCEL’S stands support lathes and drill presses an that OPPOSER-PETITIONER PUCEL’S customers use the stands to support lathes and drill presses. (O/P PUCEL RM TR. DEPO. pp 95-6.

OPPOSER-PETITIONER PUCEL’S United States Trademark Registration 0624,055 is for the mark GRIZZLY and includes goods of “**STANDS.**”³ If APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL includes lathe centers, sells machines like lathes, lathe accessories, and lathe centers as set forth in its application to register GRIZZLY.COM (O/P PUCEL TR. EXH. 7) and many other similar products mounted on stands, the stand is “related” to lathes, lathe centers and lathe accessories as they are sold together to the same customers for the same purpose. ⁴

Although some of APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL’S featured goods enumerated in the ‘346 application to register have significant differences and are not competitive with

³Similarly, APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S 2001 CATALOG also illustrates STANDS used together with other equipment. O/P PUCEL TR. EXH 69.

⁴Several additional featured goods in the ‘346 application such as end mills, end mill holders, grinder, grinding wheels, mortiser machines, routers, saws, cutting tools, drill presses, drilling and boring equipment, metalworking machines, welding machines and many others are used on stands.

OPPOSER-PETITIONER PUCEL'S goods and services, they are related in that they are industrial goods and they are available for sale online, through catalogs and stores under circumstances (ie, bear the identical GRIZZLY mark thereon) which bespeak a common origin in the mind of the consuming public. In fact, as demonstrated herein, the parties sell to the same customers as set forth in OPPOSER-PETITIONER-PUCEL'S opening brief pp. 32-34. APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL uses the mark "GRIZZLY" on stands (A/R GRIZZLY INDUSTRIAL TR. EXH. 26; <http://www.grizzly.com/products/H7742/images>) See, *Cooper Industries, Inc. v. Repeparts USA, Inc.*, 218 USPQ 81, 83-4 (TTAB 1983); *Monsanto v. Enviro-Chem Corp.*, 199 USPQ 590, 595-6 (marketing encountered by persons under same marks results in confusion even though goods are not competitive). As such, substantial evidence as to relatedness is shown.

7. Common Law: COMMON LAW RIGHTS WERE PLEADED AND TRIED WITHOUT OBJECTION

Opposer-Petitioner Pucel Enterprises, Inc. filed an Amended Notice of Opposition alleging therein on page 6, paragraph 4:

"Opposer, for many years and long prior to the alleged first use or intent to use "GRIZZLY.COM" by Applicant, has become widely known as a source of Opposer's said above described products having good quality and has acquired a favorable reputation for its said above described **products and services sold under, and in association with, the trademarks "GRIZZLY" and "GRIZZLY BEAR SYMBOL"**. Opposer has acquired a favorable reputation and goodwill under the trademark "GRIZZLY" AND "GRIZZLY BEAR SYMBOL" as a dependable source of said above described products and **services.**"

OPPOSER-PETITIONER PUCEL'S Amended Notice of Opposition and Cancellations pleaded common law usage of "**GRIZZLY**" and the "**GRIZZLY BEAR SYMBOL**" trademarks for goods and *services*.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL suggest they had no notice of OPPOSER-PETITIONER PUCEL ENTERPRISES' common law grounds for opposition based upon Opposer Petitioner's service mark use of "GRIZZLY" and "GRIZZLY BEAR SYMBOL". However, this is not true as it was *clearly pleaded* giving fair notice to APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL and *tried without objection*.

R. 8(e)(1), Fed. R. Civ. P., states: “Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.”

The Supreme Court of the United States held that the rules restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in preparation for trial. *Hickman v. Taylor*, 67 S.Ct. 385, 329 U.S. 495, 91 L.Ed. 451 (1947). The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. *SEC v. Time-trust, Inc.*, 28 F. Supp. 34, 41 (D.C. Cal. 1939).

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL received fair notice that Opposer-Petitioner Pucel Enterprises, Inc. was relying on common law rights and this is evident from the Amended Notice of Opposition and the Cancellations. The Amended Notice of Opposition makes reference to products and *services* sold under, and in association with, the trademarks “GRIZZLY” and “GRIZZLY BEAR SYMBOL”. The United States Trademark Registrations pleaded in the Amended Notice of Opposition were for goods. Opposer Petitioner Pucel clearly provides notice that it has acquired a favorable reputation for *services* sold under “GRIZZLY” and “GRIZZLY BEAR SYMBOL”. (Emphasis ours) See ¶¶ 4, 8 and 9 of the Amended Notice of Opposition.

In regard to each of the cancellations, references are made to “*previously used*” goods which includes goods beyond the registrations. See Petition for Cancellation of Trademark Registration No. 2,166,833, pp 4-5, ¶ 11 by way of example. Clearly, by referring to “*previously used*” goods INDUSTRIAL GRIZZLY INDUSTRIAL was on notice that Opposer Petitioner Pucel Enterprises was claiming use of its mark beyond its registrations.

Additionally, discovery by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL was conducted in regard to *goods and services beyond the registrations* of OPPOSER-PETITIONER PUCEL.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL was well aware that common law rights were being asserted in this consolidated proceeding as evidenced by their R. 30(b)(6), Fed. R. Civ. P., notice of deposition. (O/P PUCEL D. DEPO EXH. R1) APPLICANT-RESPONDENT GRIZZLY

INDUSTRIAL's Notice of Deposition states in paragraph 2 thereof that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL intended to inquire about:

"Pucel's advertising, sale and marketing of *products and services* under the Marks."

It will be noted that the APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's notice of deposition does not limit the scope of examination to the registered marks or the registrations. Rather, the notice includes examination as to Pucel's *products and services* sold and marketed under the "GRIZZLY" and "GRIZZLY BEAR SYMBOL" marks. No limitation on the scope of the examination was indicated in the notice of deposition. In fact, a portion of OPPOSER-PETITIONER PUCEL'S website bearing the GRIZZLY word mark and the GRIZZLY BEAR SYMBOL was marked as O/P PUCEL D. DEPO. EXH. R 26 and it was identified by Robert Mlakar, Vice President of OPPOSER-PETITIONER PUCEL at O/P PUCEL RM D. DEPO. p. 116. Mr. Mlakar identified the website as OPPOSER-PETITIONER PUCEL'S electronic retail store (O/P PUCEL RM D. DEPO. p. 115) to sell to people off the street.

Further, the discovery depositions and trial testimony of both Anthony F. Mlakar and Robert A. Mlakar are in evidence and are replete with testimony about OPPOSER-PETITIONER PUCEL'S use of the marks. (O/P PUCEL RM D. DEPO pp. 19, 49, 50, 58, 59, 64, 68, 69, 78, 93, 112, and 115). Testimony was given about use of the registered marks for the goods cited in the registrations and use of the marks for goods and services not identified in OPPOSER-PETITIONER PUCEL'S registrations. Testimony as to dates of first use of the marks for unregistered goods and services was elicited. OPPOSER-PETITIONER PUCEL'S opening brief is replete with citations for the use of the marks for the goods in the registrations and for related goods and services not specifically recited in the registrations.

8. Opposition No. 123,506: SEE OPPOSER-PETITIONER PUCEL'S OPENING BRIEF AND INSTANT REPLY BRIEF

9. Cancellation No. 32,024: SEE OPPOSER-PETITIONER PUCEL'S OPENING BRIEF AND INSTANT REPLY BRIEF

**10. Cancellation Nos. 31,984 and 32,025: SEE OPPOSER-PETITIONER PUCEL'S
OPENING BRIEF AND INSTANT REPLY BRIEF**

11. Dr. Levy's testimony should be stricken in its entirety.

Dr. Levy's report, A/R GRIZZLY INDUSTRIAL TR. EXH. 68, was objected to at trial and should be stricken in its entirety as it is based upon incomplete facts. Dr. Levy reviewed APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL's trial exhibits, A/R GRIZZLY INDUSTRIAL TRIAL EXHS. 48 and 49. Further, the alleged dilution search EXH. 48 and the alleged corporate name search EXH. 49 are inadmissible. See, TBMP 704.03(b)(1)B, Third Party Registrations, indicating that database reports from companies concerning third party registrations and other documents are not properly admitted.

Secondly, the OPPOSER-PETITIONER PUCEL'S website documents reviewed by Dr. Levy were incomplete. See, OPPOSER-PETITIONER PUCEL TR. EXH. 38A, 60, and 61. Further, it appears that APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S website documents A/R GRIZZLY INDUSTRIAL TR. EXH. 47 had all damaging documents removed therefrom. See A/R GRIZZLY INDUSTRIAL D. DEPO. EXHS. O/P 14, 16. It appears that someone pulled the damaging documents from A/R GRIZZLY INDUSTRIAL TR. EXH. 47, represented it as the GRIZZLY INDUSTRIAL website, and then gave it to Dr. Levy!

Dr. Levy also reviewed an incomplete GRIZZLY INDUSTRIAL CATALOG 2005 catalog with pages pulled from it wherein certain material handling goods and industrial equipment is found. For instance, A/R GRIZZLY INDUSTRIAL TR. EXH. 2 doesn't match OPPOSER-PETITIONER PUCEL TR. EXH. 68, GRIZC 9548-9550 missing GRIZZLY INDUSTRIAL'S version and these documents were missing from the set reviewed by Dr. Levy.

Dr. Levy testified that he had not reviewed OPPOSER-PETITIONER PUCEL'S trademark registrations or the goods they covered (A/R GRIZZLY INDUSTRIAL SL TR. DEPO. p. 41), had never been a witness before the TTAB before (A/R GRIZZLY INDUSTRIAL SL TR. DEPO. p. 30-31) and didn't know the factors considered in a trademark likelihood of confusion analysis (A/R GRIZZLY INDUSTRIAL SL TR. DEPO. P. 48). Dr. Levy admitted that the GRIZZLY mark as used for PUCEL'S

goods could be a strong mark⁵ and that the parties could have the same channels of trade but that he didn't think so.(A/R GRIZZLY INDUSTRIAL SL TR. DEPO. P. 54, 56). Dr. Levy also failed to execute his report as required by R. 26, Fed. R. Civ. P.

Dr. Levy's analysis constitutes an unsupported conclusion that the parties have a different marketing identity. The information upon which Dr. Levy's obscure opinion is based was incomplete and as such it should be stricken.

II. LIKELIHOOD OF CONFUSION EXISTS

1. MARKS OF THE PARTIES ARE IDENTICAL

OPPOSER-PETITIONER PUCEL'S registrations are for the word mark GRIZZLY and for the GRIZZLY BEAR SYMBOL. Additionally, OPPOSER-PETITIONER PUCEL introduced evidence at trial and discovery was conducted as to usage of the marks are goods and services not identified in OPPOSER-PETITIONER PUCEL'S registrations. APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL argues that OPPOSER-PETITIONER PUCEL presents its marks in lower case script and that the design registrations of the GRIZZLY BEAR SYMBOL have no bearing on this proceeding. The facts of the instant opposition are similar to facts found in *Squirtco v. Tomy Corp.*, 216 USPQ 939 (Fed. Cir. 1983) wherein Squirtco's registration was for "Squirt" located within a dark medallion and Tomy Corp. sought to register SQUIRT SQUAD in block lettering. The Federal Circuit reversed dismissal of the Opposition stating:

"First, the argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party. Tomy asserts rights in SQUIRT SQUAD regardless of type styles, proportions, or other possible variations. Thus, apart from the background, the displays must be considered the same."

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL is asserting a similar argument to that made by Tomy Corp. which must fail as the marks of the parties are legally identical. Further,

⁵APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has submitted several third party registrations, however, "there is no evidence showing that any of them are in use so as to have conditioned the minds of purchasers" and therefore should be given little, if any, evidentiary weight. See, *San Fernando Electric, Mfg. Co. v. JFD Electronics Components Corp.*, 196 USPQ 1, 2.

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL, in dismissing the significance of OPPOSER-PETITIONER PUCEL'S GRIZZLY BEAR SYMBOL mark, is in error since it has long been held that the depiction of an animal is equivalent to the name of the animal from a trademark point of view. *Squirrel Brand v Green Gables*, 223 USPQ 154 (TTAB 1984).

2. CHANNELS OF TRADE

As elicited in OPPOSER-PETITIONER PUCEL'S opening brief p. 27-32, the sum and substance of both parties channels of trade are through catalogs, through websites on the internet, and through retail stores. OPPOSER-PETITIONER PUCEL also sells through distributors and the distributors tie their websites to OPPOSER-PETITIONER PUCEL'S website. See, O/P PUCEL TR. EXH. 60 wherein the distributor Indoff's site is illustrated displaying. Sale of OPPOSER-PETITIONER PUCEL'S goods through its website were elicited on O/P PUCEL RM D. DEPO pp. 19, 49, 50, 58, 59, 64, 68, 69, 78, 93, 112, and 115. In particular, Mr. Robert Mlakar testified that the Internet was like an online retail store. O/P PUCEL RM D. DEPO p 115.

Catalogs are sent to all of their customers and distributors. (O/P PUCEL RM TR. DEPO pp 205) OPPOSER-PETITIONER PUCEL also sells by mail order. (O/P PUCEL RM TR. DEPO pp 149). OPPOSER-PETITIONER PUCEL sells all of the products identified above in connection with the APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL'S application to register GRIZZLY.COM on its website, www.pucel-grizzly.com.

3. INSTANCES OF ACTUAL CONFUSION

APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL has objected to the O/P PUCEL TR. EXHS. 44-51, inclusive, as well as all testimony related thereto. Anthony Mlakar testified that the records are kept in the ordinary course of business.

O/P PUCEL TR. EXH. 44 is a catalog request form whereupon an indication was made that the customer wanted a catalog and purchased welding benches from Grizzly Industrial. Mr. Anthony Mlakar testified that he knew the person and the person's writing that made the record and that the record was made and kept in the ordinary course of business. O/P PUCEL AM TR. DEPO. pp. 47-48.

O/P PUCEL TR. EXH. 45 was identified as a OPPOSER-PETITIONER PUCEL customer (distributor) seeking a quotation from OPPOSER-PETITIONER PUCEL of equipment sold by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL. Mr. Mlakar testified that the request for quotation was faxed to PUCEL in the ordinary course of business and was maintained as a business record. O/P PUCEL AM TR. DEPO. pp. 48-51.

O/P PUCEL TR. EXH. 46 was identified as correspondence from a distributor of OPPOSER-PETITIONER PUCEL seeking a competitive quotation on a product made sold by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL. Mr. Anthony Mlakar testified that the record was made and kept in the ordinary course of business. O/P PUCEL AM TR. DEPO. pp. 48-51.

O/P PUCEL TR. EXH. 47 was identified as catalog request form dated October 18, 2000 requisition indicating that the customer from POWER AND RUBBER SUPPLY INC. was looking for APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL. Mr. Anthony Mlakar testified that the catalog request form is kept in the ordinary course of business and that he knew the PUCEL employee (Jim Smith) that made the record and that he recognized his handwriting. O/P PUCEL AM TR. DEPO. pp. 52-53.

O/P PUCEL TR. EXH. 48 was identified as a letter dated August 16, 2000 from Industrial Appraisal Company addressed to GRIZZLY EQUIPMENT MFG. BY PUCEL ENTERPRISES INC asking for a quotation of a spindle sander sold by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL. Mr. Anthony Mlakar testified that the record was made in the ordinary course of business. O/P PUCEL AM TR. DEPO. pp. 53-54.

O/P PUCEL TR. EXH. 49 was identified as a letter from Supply Depot, a company believed to be a customer of PUCEL, requesting a quotation for products sold by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL dated October 4, 2000. O/P PUCEL AM TR. DEPO. pp. 54-55.

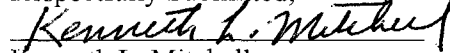
O/P PUCEL TR. EXH. 50 was identified as a letter from FIND MRO, a division of GRAINGER and a known customer of PUCEL, requesting a quotation from PUCEL for products sold by APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL. Anthony Mlakar testified that the document was made and kept in the course of ordinary business. O/P PUCEL AM TR. DEPO. pp. 55-56.

As such, evidence of actual confusion is admissible as an exception to the hearsay rule. See, Fed. R. Evid., R. 803(6). This evidence of actual confusion indicates relatedness of the goods and services of APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL and OPPOSER-PETITIONER PUCEL in the minds of the purchasing public as various customers were confused as to the source of goods such as: welding benches (Ex. 44); sliding table shaper, shaper door lip, shaper glue, shaper door edge, shaper drawer joint (all Ex. 45); carts (Ex. 46); spindle sander (Ex. 48); router, belt sander, jig saw, blade sharpener, table saw, planer, bandsaw, lathe and drill press, battery charger, starter, jointer and air compressor (all Ex. 49); and feeler gauge, blades, tap stick, thread restorers (all. Ex. 50). These customers were in some instances trying to buy PUCEL'S GRIZZLY EQUIPMENT using GRIZZLY INDUSTRIAL part numbers.

III. SUMMARY

It is respectfully submitted that OPPOSER-PETITIONER PUCEL has demonstrated a likelihood of confusion by a preponderance standard. The parties' **GRIZZLY** marks are: identical; are used on identical, similar and related goods and services; are sold through identical and similar trade channels; and, to the same and similar customers. Substantial evidence as to relatedness of the goods and services has been shown. Likelihood of confusion between the parties' goods and services, including those which are related and which may be non-competitive, has been shown by substantial evidence warranting the sustainment of the oppositions and cancellations in their entirety.

Respectfully Submitted,

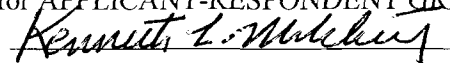


Kenneth L. Mitchell

Counsel for Opposer-Petitioner Pucel Enterprises, Inc.

CERTIFICATE OF SERVICE

A copy of the above OPPOSER'S-PETITIONER'S (PUCEL'S) REPLY BRIEF was mailed May 17th, 2007, by United States First Class Mail, postage prepaid, to Joseph Schmidt, Esq., Joseph F. Schmidt, Welsh & Katz, Ltd., 120 South Riverside Plaza, 22nd Floor, Chicago, Illinois 60606-3912, and e-mailed to jfschmidt@welshkatz.com, attorneys for APPLICANT-RESPONDENT GRIZZLY INDUSTRIAL, INC.



Kenneth L. Mitchell